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No. 93-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PUBLIC CITIZEN AND SIERRA CLUB,

Petitioners,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF REPLY

Respondent urges the Court to deny the petition because it contends that (1) there is no present conflict among the circuits on the applicability *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), to the environmental impact statement ("EIS") requirement of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332; and (2) this case is moot because the particular trade agreement for which an EIS was sought has been approved by Congress. Although technically correct, these contentions seek to divert the Court's attention from the strongest reason

for granting review -- this case raises important issues resolved by the court below in a way that conflicts with longstanding precedents of this Court and of the lower courts.

By focusing solely on post-*Franklin* court of appeals' cases, rather than on the statutory provision on which *Franklin* was based, the government unjustifiably narrows the universe of conflicts warranting this Court's consideration. In particular, the government's opposition completely ignores the conflict, recognized by Judge Randolph in his concurrence below, between the decision here and this Court's previously unquestioned pronouncement of when NEPA challenges may be brought under the Administrative Procedure Act ("APA"), *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), as well as this Court's application of that principle in a case where the President had a role similar to the one that he had here. *Andrus v. Sierra Club*, 442 U.S. 347 (1979).

As to mootness, this case falls squarely within the exception to mootness for cases capable of repetition, yet evading review. While the issue is moot as to the North American Free Trade Agreement ("NAFTA"), the President notified Congress on December 15, 1993, of his intention to enter into the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT"), which he will then sign by April 15, 1994, and thereafter submit to Congress for approval. *See* 19 U.S.C. § 2903(a)(1)(A), as amended by Pub. L. No. 103-49, 107 Stat. 239 (1993). Since the Uruguay Round agreement was part of petitioners' first NEPA challenge against respondent, *Public Citizen v. Office of the U.S. Trade Representative*, 970 F.2d 916 (D.C. Cir. 1992), the President's official notification of his intent to enter into it eliminates any claim that the dispute between the parties will not recur, and hence, this case is not moot. If the Court has any doubt about this proposition, it should do what it did last term in *Helling v. McKinney*, 113 S. Ct. 2475, 2482 (1993), and decide the threshold issue that was

decided below, leading to outright dismissal of the case, and then remand the case for development of a record so that the issue of mootness, the related issue of standing, and, if appropriate, the merits can be decided by the lower courts.

REASONS FOR GRANTING THE WRIT

A. The Question Presented Warrants Review.

In responding to the petition, the government's opposition is most noteworthy for what it does not address. Most striking is the government's complete failure to mention *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976), in which this Court established that the time for judicial intervention in a NEPA case is "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." *See also id.* at 406 ("the moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation on a *proposal* for federal action.'") (internal citation omitted).

Under this test, the courts have uniformly considered an agency's failure to issue an EIS with its report or recommendation on a proposal to be final agency action reviewable under the APA. *See* Pet. at 12-16. Nonetheless, the court below declined to review the Office's refusal to prepare an EIS on its recommendation to enter into NAFTA, because it construed the challenged action to be the NAFTA itself, rather than the agency's NAFTA recommendation without an EIS. In this respect, the decision below deviates sharply from the past two decades of judicial review of NEPA cases, and from the only other post-*Franklin* NEPA case involving a matter on which the President has statutory authority to make the final decision. *Colorado Environmental Coalition v. Lujan*, 803 F. Supp. 364 (D. Col. 1992).

The government ignores both *Kleppe* and the marked

deviation of the D.C. Circuit's majority opinion from the *Kleppe* standard. In contrast, Judge Randolph, in his separate concurrence below, recognized that the courts would need to reconcile "*Franklin*'s direct-effects-on-the-parties test, as applied to NEPA suits . . . with the portion of *Kleppe*" identifying the appropriate time for judicial review in NEPA cases.

This petition seeks such a reconciliation with both *Kleppe* and the long line of lower court cases applying that standard to permit judicial review of NEPA claims concerning legislative proposals and presidential decisions. The government does not dispute petitioners' contention that the courts have reviewed legislative EIS cases, even though the President has the constitutional authority to submit legislation to Congress. Pet. at 13-14. The government does not even acknowledge the many legislative EISs cited by petitioners, except to note that one such case was decided without reference to the APA. *See* Opp. at 19.

Nor does it discuss the line of cases in which the courts, including this Court, decided whether appropriation requests submitted to Congress by the President are subject to the legislative EIS mandate. Pet. at 14; *Andrus v. Sierra Club*, 442 U.S. 347 (1979). Appropriations requests are analogous to trade agreements in that the President, both under the Constitution and in practice, submits them to Congress, yet the courts have reviewed agencies' NEPA compliance under the APA once the agency has made its budget proposals without an EIS, notwithstanding the President's role in the process.

Several other NEPA cases have reviewed agencies' NEPA compliance with respect to international agreements entered into by the President. *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 752 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991) (presidential agreement to remove obsolete munitions from Germany); *see also*

Wisconsin v. Weinberger, 745 F.2d 412, 415 (7th Cir. 1984) (pursuant to statutory mandate, the President submitted to Congress a plan to reactivate a submarine communications system, which was a proposal developed by the Secretary of the Navy). Under the decision below, judicial review of those actions would be unavailable because the President, not the agency, has the constitutional or statutory authority to take the final steps to enter into international agreements.

Tacitly conceding that the D.C. Circuit decision, on its face, deviates from judicial review of EIS cases concerning legislative proposals and international agreements, the government suggests that the decision below applies only to "special statutory schemes under which the final decisionmaking authority for the Executive Branch rests with the President personally." Opp. at 19. Of course, whether the D.C. Circuit decision can be fairly limited to "special" statutory schemes goes to the merits of the reviewability question. Such a narrow reading is contradicted by the majority opinion itself, which states that APA review is unavailable where "the President has final constitutional *or* statutory responsibility for the final step necessary for the agency action directly to affect the parties." Pet. App. 7a (emphasis added). Moreover, in this case, respondent relied as much, if not more, on the President's constitutional power to submit legislation to Congress and to negotiate treaties, than it did on the President's specific statutory decisionmaking power. Notably, the government has not foresworn reliance on *Franklin* or the decision below in cases where there is no "special" statutory scheme. It is precisely because the decision below is not so limited that it has thrown the administration of NEPA into disarray and calls for this Court to clear up the confusion.

Rather than confront the extensive body of cases reviewing NEPA claims analogous to the one found unreviewable below, the government contends that this Court should not review this case because there is no post-*Franklin* circuit conflict on the question of how to apply *Franklin* to

NEPA cases. That much is true. However, there is a fundamental conflict between the approach taken by the D.C. Circuit and the standard enunciated in *Kleppe*. There is also a conflict between the D.C. Circuit's preclusion of APA review and the position taken in virtually every other legislative EIS case, including *Andrus*, and every other NEPA case concerning a matter on which the President made or could have made the final determination, by virtue of his statutory or constitutional powers. Pet. at 12-16. Therefore, the D.C. Circuit's decision is a marked departure from the settled APA principles on which *Franklin* itself is based.

It is, after all, the APA, and not the language in *Franklin*, that controls the availability of APA judicial review. It has long been recognized that the APA embodies a broad presumption of reviewability that may be overcome only upon a showing of clear and convincing evidence that Congress intended to preclude judicial review. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). This presumption is at its zenith with respect to claims that an agency has violated a nondiscretionary statutory mandate, like NEPA's EIS requirement. *See, e.g.*, *Bowen*, *supra*. Where an agency has taken its final step that makes the EIS requirement applicable, *i.e.*, it has made its recommendation on a proposal for legislation or other major federal action, APA review is available, as this Court held in *Kleppe*. Neither *Franklin* nor the President's involvement in the matter changes that result.

The government and the court below reached the opposite conclusion because of their erroneous identification of the challenged action as NAFTA itself, rather than the agency's failure to include an EIS in its final recommendation on NAFTA. Respondent's Second Question Presented at i; Opp. at 22-23; Pet. App. 6a. Since petitioners are not challenging the NAFTA, the President's decisions to enter into the NAFTA and to submit it to Congress are irrelevant to the availability of APA review here.

What petitioners are challenging is respondent's failure to include an EIS in its recommendation to the President to enter into the NAFTA. Respondent has never disputed that it is charged, by statute, with being the chief negotiator of international trade agreements, and that, in the course of playing such a role in the NAFTA negotiations, it made a recommendation to enter into the NAFTA, which would require preparation of an EIS, if NEPA applies to trade agreements.

In this respect, NEPA is like the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, which the government concedes requires agencies "to follow specific procedural requirements." Opp. at 21. Like NEPA claims, judicial review of FACA violations is obtained under the APA because there is no separate cause of action in the substantive statute. However, courts have found FACA violations to be the final agency action under review, without waiting for the closed meeting or withheld records to lead to a decision harming the litigant. *See, e.g., Food Chemical News v. Advisory Committee on the Food and Drug Administration*, 980 F.2d 1468 (D.C. Cir. 1992); *National Security Archive v. Archivist of the United States*, 909 F.2d 541 (D.C. Cir. 1990); *Public Citizen v. National Economic Commission*, 703 F. Supp. 113 (D.D.C. 1989). Similarly, this Court decided *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), under the APA, even though the committee at issue provided advice on judicial nominees to be passed onto the President, who alone has the constitutional power to nominate federal judges.[1]

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[1]The separation of powers concerns raised in that case shaped the Court's decision, but were never asserted as a basis for declining to hear the case at all. The government converts similar arguments into a justification for construing the APA to preclude judicial review, even though it never

(continued...)

For the same reason, there is final agency action once an agency fails to include an EIS in its recommendation on a proposal or prepares an inadequate one. *Kleppe*, *supra*. Because the decision below reached the opposite and erroneous conclusion, which is at odds with *Kleppe* and its extensive progeny, this Court's review is warranted.

The fact that this Court has granted the petition for a writ of certiorari in *Dalton v. Specter*, No. 93-289, in which *Franklin*'s effect on the reviewability of agency actions is also at issue, does not eliminate the need for review in this case. The government's attempts to distinguish *Dalton* are misguided. The portion of *Dalton* that challenges the agency's failure to hold public hearings or publish information at the time specified in the statute is directly analogous to the failure to prepare an EIS here. Indeed, in its reply brief in support of the petition in *Dalton*, the government specifically pointed to this case as being in conflict with *Dalton*, thereby supporting the need for this Court's review. Reply at 8 n.8.

Although the two cases raise similar statutory claims, *Dalton* seeks to enjoin implementation of the President's decision, while petitioners here merely seek to compel agency compliance with NEPA. Moreover, because the Third Circuit relied in its second decision on the Constitution, not the APA, as the basis for judicial review, and because *Dalton* presents an additional basis for reversal that is not dependent on *Franklin*, this Court's resolution of *Dalton* may not assist the lower courts in clarifying *Franklin*'s application to NEPA and other procedural statutes.

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[1](...continued)
made such an argument below. Opp. at 23-26. In any event, those arguments, which petitioners strongly contest, are properly directed to the merits of petitioners' claims, not to the threshold reviewability issue.

It was for these reasons that the petition urged the Court to hear this case with *Dalton*. In order to facilitate this Court's consideration of the two cases together, petitioners filed their petition in printed form just two weeks after the ruling of the D.C. Circuit, which was one week before this Court considered the *Dalton* petition. Although petitioners asked respondent to file its opposition promptly to keep this case on a schedule as close as possible to that in *Dalton*, respondent took nine weeks to file its opposition. As a result, by the time this Court considers this petition, the principal briefs in *Dalton* will have been filed, although, as of this date, oral argument has not been scheduled. Nonetheless, to enable the Court to hear the cases together, petitioners are willing to file their brief on the merits within three weeks and make whatever other adjustments are necessary to permit joint consideration with *Dalton*. At a minimum, this Court should hold this petition pending the disposition of *Dalton*.

B. This Case Falls Within the Mootness Exception for Matters Capable of Repetition, Yet Evading Review.

Now that Congress has approved the NAFTA, petitioners agree that their demand for an EIS on the NAFTA is moot. However, this case falls within the mootness exception for matters that are capable of repetition, yet evading review. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

Although this particular case arose in the context of NAFTA, it is part of a larger controversy concerning respondent's refusal to comply with NEPA with respect to trade agreements generally. During the course of this litigation, and the case that preceded it, respondent admitted that it had never prepared an EIS on a trade agreement. Moreover, the Office made it crystal clear that it had no intention of ever doing so, because it believed (and vigorously defended its belief) that NEPA is inapplicable to

trade agreements, regardless of their environmental effects. It is for that reason that the complaint in this case sought a declaration that respondent has violated NEPA by failing to prepare EISs on the NAFTA *and other trade agreements* that it has negotiated and that it is negotiating. Court of Appeals' Joint Appendix 12.

Recent developments have removed any doubt as to whether the challenged action will recur. On December 15, 1993, the President officially notified Congress of his intention to enter into the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT"). That notification came in time for the President to submit the agreement to Congress for approval under fast-track procedures, provided he signs it by April 15, 1994. *See* 19 U.S.C. § 2903(a)(1)(A), as amended by Pub. L. No. 103-49, 107 Stat. 239 (1993).

The Uruguay Round agreement was part of petitioners' initial demand for EISs on trade agreements, and their first lawsuit to compel the preparation of such EISs. *Public Citizen v. Office of the U.S. Trade Representative*, 970 F.2d 916, 917 (D.C. Cir. 1992). Accordingly, there is more than a substantial likelihood that the dispute between the parties will continue to recur; it has, in fact, arisen once again during the pendency of this petition.

There is also every reason to believe that any case seeking an EIS on the Uruguay Round would evade complete judicial review, just as this one has. By way of example, this case was filed within weeks of the conclusion of the NAFTA negotiations, and the case was expedited in the lower courts. Nonetheless, the issue of whether the courts may decide the merits is still unresolved more than 15 months later. In any future challenge, the first issue to be resolved will be the precise one presented here: whether, under *Franklin*, the case may be heard under the APA. The government's many defenses and arguments would then need to be resolved. As occurred here, Congress is likely to

approve the trade agreement before the appeals and remands run their course, thereby rendering the particular claim moot.

The government argues that this case is not within the mootness exception because petitioners may not be able to demonstrate that they have standing to challenge the failure to prepare an EIS on another trade agreement. Opp. at 14-15. That contention depends on extensive facts that are not in the record, and issues that were not decided by the D.C. Circuit or the district court. Accordingly, it should not be decided by this Court, and certainly not at the petition stage.

Moreover, under the decision below, future cases are likely to be derailed without reaching the standing issue. The D.C. Circuit's decision that APA review is unavailable closes the door to challenges to the Office's NEPA compliance with respect to any trade agreement, regardless of its terms. This threshold issue must be resolved before the courts have the authority to decide other issues in connection with a NEPA challenge to the Uruguay Round or any other trade agreement. Accordingly, this Court should hear this case, and if it decides that APA review is available, it should remand for the D.C. Circuit to determine whether the case falls within the mootness exception. This was the approach followed in *Helling v. McKinney*, 113 S. Ct. 2475, 2482 (1993), where this Court decided the threshold issue that led to outright dismissal of the case below, and then remanded the case for development of a record on the issue of mootness and the merits.

Finally, the government makes the anomalous suggestion in a footnote that this Court should decide that this case is moot, but nonetheless deny the petition outright. Opp. at 15 n.5. That suggestion runs directly counter to the rule that a decision should be reversed or vacated where mootness deprives the losing party of the opportunity to have it reviewed. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). Acknowledging the weakness of its position, respondent cites no cases adopting this approach,

but relies entirely on its own assertions in other briefs filed by the government itself. Given the unprecedented nature of the decision below, it would be wholly inappropriate to let the D.C. Circuit's decision stand, if mootness precludes review by this Court.

CONCLUSION

For all of these reasons, the petition should be granted or held pending resolution of *Dalton*.

Respectfully submitted,

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